Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

ERNEST A. JANIK, JR., individually, on behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik; LEAH EILEEN JANIK, individually, on behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik,

Petitioners,

v.

CITY OF DALLAS, TEXAS,
an incorporated municipality,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit's continued application of its "bright line rule" in *Friends of the Earth v. Crown Central Petroleum Corp.*, 95 F.3d 358 (5th Cir. 1996), — notwithstanding this Court's **Article III** standing doctrine settled in *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 120 S.Ct. 693, 704, 707-708 (2000), — can justify dismissal of a **Clean Water Act** citizen suit for past and continuing **NPDES permit** violations.

2. Whether a district court's factual detail requirements for a **Resource Conservation & Recovery Act** ("RCRA") citizen suit pleading in the alternative, — notwithstanding this Court's "notice pleading" doctrine settled in *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 103 (1957), — and notwithstanding a pending **Rule 15(d)** motion to more definitely state the RCRA citizen suit's critical facts (involving disposed chemicals defined by the E.P.A. in **40 CFR Pt. 122** as "hazardous substances"), — may be dismissed as if a RCRA-based claim had not been pled.

3. Whether a nonmovant's **Rule 56(e)** evidence, including expert and fact witness declarations, may be deemed "undesignated" (and thus be ignored without meaningful Rule 56 evaluation), when the nonmovant's Rule 56(e) initial objection omitted pagination cites to such Rule 56(e) declarations, — notwithstanding this Court's substance-over-form norm settled in *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553 (1986), — even though immediately cured by nonmovant.

4. Whether a district court's **Rule 56** rulings in a **Clean Water Act/R.C.R.A.** citizen suit can avoid applying **Article VI's Supremacy Clause** to preëmptively limit state "governmental immunity" claimed by a city regarding its acts or omissions that violate federal environmental statutes, — notwithstanding this Court's federalism doctrine and preëmption ruling settled in *Sanitary District of Chicago v. U.S.*, 266 U.S. 405, 425-426, 45 S.Ct. 176, 178 (1924).

PARTIES TO THE PROCEEDINGS

Although this litigation has involved the City of Dallas and a variety of insurance defendants, **the City of Dallas, Texas, is the only defendant, petitioners believe, having an interest in this Petition for Writ of Certiorari.**

The petitioners herein are the plaintiffs below, **Ernest A. Janik, Jr. and Leah Eileen Janik, individually and on behalf of their minor sons, Grant Joseph Janik and Tyler Newman Janik.**

The defendants at the trial court level were seven: the **City of Dallas, Texas,** an incorporated municipality, plus the following six "insurance defendants" (whose d/b/a's are omitted as irrelevant to this appeal): **Amica Mutual Insurance Company,** a Rhode Island company, **Nobel Service Corporation,** a Delaware corporation, **IAS Claim Services, Inc.,** a Delaware corporation, **Nobel Holdings, Inc.,** a Delaware corporation (dismissed by summary judgment prior to trial), **Insurance Adjustment Services of Texas, Inc.,** a Texas corporation (dismissed by agreement as defunct), and **Floyd Myers** (dismissed by agreement before trial).

Of the seven trial court level defendants, only the following four were parties at the circuit court of appeals level: the **City of Dallas, Texas, Amica Mutual Insurance Company, Nobel Service Corporation,** and **IAS Claim Services, Inc.**

At the circuit court of appeals level there was one appeal that involved the **City of Dallas, Texas,** namely, 5th Circuit Appeal No. **98-10781,** which followed a summary judgment favoring that city.

A trial was had on some of the Janiks' claims against three of the insurance defendants. An appeal that did not include the City of Dallas as a party (but which arose from the same civil action) followed said trial, namely, 5th Circuit Appeal No. **98-11369.**

The 5th Circuit administratively consolidated both of these two appeals and simultaneously denied both appeals by an order of **July 6, 2000.** This denial (which affirmed the district court's summary judgment for the city, *and* affirmed the district court's post-trial JNOV for the insurance defendants) was the subject of the Janiks' petition for a panel rehearing, which petition was denied by the panel's order of **August 3, 2000**.

In this Petition for Writ of Certiorari the Janiks are not seeking review of the insurance-related rulings (i.e., the Janiks are not herein seeking review of 5th Circuit Appeal No. **98-11369**); rather, the Janiks are herein seeking review only of the City of Dallas-related summary judgment and its component interlocutory rulings (i.e., the Janiks seek review of the affirmance in 5th Circuit Appeal No. **98-10781**).

Thus, the only real parties of interest in this proceeding, petitioners believe, are the above-named family of plaintiffs ("Janiks") and the City of Dallas, Texas, a municipality ("city").

As a matter of informational completeness, there remains yet another appeal now pending in the Fifth Circuit that involves the insurance "half" of this litigation; — that appeal is 5th Circuit Appeal No. 99-11385, but that pending appeal (which involves Rule 59 and Rule 60 motions) does not involve the City of Dallas as a party and is not legally relevant to any of the four legal questions presented in this Petition for Writ of Certiorari.

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JURISDICTION

Petitioners' timely appeal in the court of appeals below was denied by an order entered July 6, 2000 (see Appendix Part "A"). A timely petition for panel rehearing was thereafter denied by the court of appeals by an order entered August 3, 2000 (see Appendix Part "A"). This Court's jurisdiction is now invoked under 28 U.S.C. § 1254(1).

STATUTES & OTHER FEDERAL LAWS INVOLVED

The statutes & other federal laws involved are: the U.S. Constitution, Article III's Section 2 and Article VI's Supremacy Clause; Clean Water Act statutes; Resource Conservation & Recovery Act statutes; portions of the E.P.A.-issued NPDES Permit for City of Dallas; and Federal Rules of Civil Procedure, Rule 15(d) and Rule 56. The text of these statutes and other federal laws are set forth in the **Appendix's Part "B"**.

STATEMENT OF THE CASE

Procedural History. **The final judgment below blended a few interlocutory partial summary judgments (Clean Water Act, etc.) with a judgment on the pleadings (RCRA claim).**

In 1993 untreated sewage wastewater harmed the Janiks, personally, and their property. In 1995 the Janiks sued the City of Dallas and various insurance entities on claims relating to the Janiks' personal injuries and property damages, combined with a Clean Water Act citizen's suit. After some discovery, cross motions for summary judgment were filed. Interlocutory partial summary judgments were granted to the City of Dallas, then vacated, revised, then quasi-reinstated. The trial court entered **Judgment** on May 28, 1998 (**Doc #352**) as to claims against the City. That Judgment relied upon prior memorandum opinions and orders ("rulings") entered below, i.e., rulings entered 10-15-1997 (**Doc #238**), 11-20-1997 (**Doc #301**), 4-17(20?)-1998 (**Doc #342**), 5-13-1998 (**Doc #343**), and 5-26-1998 (**Doc #350**). The Fifth Circuit panel affirmed and denied a rehearing.

Statement of Relevant Facts. On 10-31-1993 untreated sewage wastewaters of the City of Dallas were discharged in a manner not authorized by the city's EPA-issued Clean Water Act/ NPDES permit ("polluter's permit"), with most of the untreated sewage wastewater invading the home of the Janiks prior to its draining into the Trinity River. This physical invasion of the Janiks property by ten-thousands of gallons of untreated municipal sewage waters, and the biohazardous contaminants therefrom, substantially and illegally interfered with the Janiks' use and enjoyment of their home and related personal property items, and sickened them. **Doc #85 at 3-19; Doc #318 at 8-11; Doc #140 at 1-5.**

This unauthorized pollution discharge produced ongoing harm to the Janiks' health, safety, and property during 1993 (and after), and revealed unauthorized conditions and practice of the

City of Dallas, as to similar biohazardous contaminations, that continue to jeopardize the health, safety, and property of the community at large, due to the past and current problems with Dallas' sanitary sewer system. **Doc #331 at 1-5; Doc #332 at 3.**

The Rule 56 evidence shows that the city did not attempt to fulfill its Clean Water Act polluter's permit-mandated duties (to preventively protect against, report, and remedially mitigate the human health-jeopardizing adverse impacts and threats of its unpermitted discharge of pollutants) to the Dallasites involved.

This unfixed and unmitigated situation has harmed U.S. waters in the tributary network of the Trinity River, since the city's unpermitted discharge of untreated sewage wastewater routinely contains at least 21 hazardous substances, in addition to raw fecal coliforms, and thus the environment is still at substantial risk.[1] **Doc #318 at 11-18.** Continuing risks of recurrences to Dallasites (including the Janiks) are still imminent, according to expert declarants Brandon (M.D.), Egbert (P.E.), and McElyea (P.E.). Continuing risk of such recurrences involve substantial endangerment to all Dallasites who (even to date) are serviced by Dallas Water Utilities; so potential for repeat of such injuries and damaged property remains. *See* **Doc #188 at 11-38, 59-63, 75-82; Doc #119 at 1-5H; Doc #82's Exhibit "B"; Doc #118 at 1-3; Doc #115 at 2-3; Doc #318 at 11-18; Doc #122 at 1-4;**

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[1] **Doc #318** is Dr. Brandon's DECLARATION WITH EXPERT OPINIONS RELEVANT TO SEWAGE-BORNE HAZARDOUS WASTES (filed 1-5-1997), a copy of which was attached as Exhibit "B" to **Doc # 326** (plaintiffs' Objection filed 1-7-1998), which identifies and discusses (at the declaration's pages 14-18) ***21 EPA-defined "hazardous wastes" reported to the EPA as being found in the City of Dallas' untreated sewage influent:*** acetaldehyde, allyl alcohol, aniline, benzyl chloride, carbaryl, carbofuran, carbon disulfide, cresol, cyclohexane, dimethyl amine, disulfoton, ethylene dibromide, formaldehyde, furfural, methoxychlor, methyl methacrylate, parathion, phosgene, resorcinol, strychnine, and triethylamine. *Regarding plaintiffs' good faith assertion of a Clean Water Act citizen suit, see* **Doc #148 at 1-5.**

Doc #130 at 3-37; Doc #85 at 3-19, 40-41; Doc #331 at 1-5; Doc #332 at 3.

REASONS FOR GRANTING THE PETITION

1. Article III Standing Issue for Clean Water Act Case.

This Court should grant a reversal, to correct the Fifth Circuit's continued application of its "bright line rule" in *Friends of the Earth v. Crown Central Petroleum Corp.*, 95 F.3d 358 (5th Cir. 1996), which conflicts with Court's **Article III** standing doctrine settled in *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 120 S.Ct. 693, 704, 707-708 (2000).

Otherwise, the Fifth Circuit will continue to affirm district court dismissals of **Clean Water Act** citizen suits, for past and continuing **NPDES permit** violations, in cases where plaintiffs have Article III injuries-in-fact that satisfy *Laidlaw* but do not satisfy the Fifth Circuit's narrower gatekeeping in *Crown Central.*

In more particularized summary, this first federal question is whether the Fifth Circuit's continued reliance upon the "bright line rule" in *Friends of the Earth v. Crown Central Petroleum Corp.*, 95 F.3d 358, 360-361 (5th Cir. 1996), — notwithstanding this Court's **Article III** ruling in *Friends of the Earth v. Laidlaw Env'l Services (TOC), Inc.*, 120 S.Ct. 693, 704, 707-708 (2000), — improperly deprived petitioners of their right to seek citizen suit relief under Section 505 of the **Clean Water Act** (33 U.S.C. § 1365), for their own past and continuing injuries caused by a city's **NPDES** permit violations, namely, both actualized and threatened injury to petitioners' human health and private property, and also to the environment, including continuing risks of injury to the tributary network of a navigable river.

This Article III question involves a "split" in the circuit courts of appeals on Article III standing, an important federal question.

(See Supreme Court Rule 10(a), regarding "conflicts" in the circuit courts of appeals.)

The Fifth Circuit continues, despite *Laidlaw*, to deny Article III standing recognition to Clean Water Act citizen suitors who do not fit its rigid and exclusive three-part formula set forth in *Friends of the Earth v. Crown Central Petroleum Corp.*, 95 F.3d 358, 360-361 (5th Cir. 1996) (*"Crown Central"*), — a test which the Third Circuit calls a "bright line rule":

> In a case similar to the one before us, the Fifth Circuit held that "an individual without standing to sue for discharge violations, a fortiori, lacks standing to sue for reporting violations." *Friends of the Earth, Inc. v. Crown Central Petroleum Corp.*, 95 F.3d 358, 362 (5th Cir. 1996) (affirming lower court's dismissal of emissions claims and monitoring and reporting claims). **Because we think that it is at least possible that some plaintiff in the future might allege a specific and concrete injury arising from a defendants' failure to monitor and report its effluent discharges, we will not adopt the Fifth Circuit's [Crown Central] bright line rule.**

Quoting *PIRG of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 124 (3rd Cir. 1997) (emphasis added). In effect, the Janiks' case would not have been dismissed on Article III standing grounds if its had been brought in a court that followed the Third Circuit's view of Article III, as opposed to the Fifth Circuit's view of Article III:

> For example, a [Clean Water Act citizen suit] plaintiff might have reason to fear the toxicity of fish in a river due to a defendant's past pollution of that river, which had resulted in injury to others. Were the defendant to then fail to monitor and report its effluent, the plaintiff might reasonably decide to forego eating fish from the river. Such a result might

> constitute the type of injury in fact necessary to support the plaintiff's [Article III] standing to sue.

Quoting *PIRG of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 124 at footnote 9 (3rd Cir. 1997).

The "split" between the Fifth and Fourth Circuits, on this Article III gatekeeping question, has been observed and discussed by a district court within the Eighth Circuit:

> The Third Circuit recently addressed this precise issue, noting the apparent split in the Circuits. *Public Interest Research Group v. Magnesium Elektron, Inc.*, 123 F.3d 111 (3d Cir.1997). In *[Sierra Club v.]* Simkins Indus., [847 F.3d 1109 (4th Cir. 1988),] only monitoring and reporting violations were alleged; nevertheless, the Fourth Circuit did find that the plaintiff had standing because such violations hindered environmental policy-makers "who might undertake to remedy the effects of any pollution." 847 F.3d at 1113. . . . The Fifth Circuit, on the other hand, has adopted a bright line rule that "'an individual without standing to sue for discharge violations, a fortiori, lacks standing to sue for reporting violations,'" *Id.* (quoting *Friends of the Earth, Inc. v. Crown Central Petroleum*, 95 F.3d 358, 362 (5th Cir. 1996)). The Third Circuit decided not to adopt this bright line rule, reasoning that "it is at least possible that some plaintiff in the future might allege a specific and concrete injury arising from a defendant's failure to monitor and report tis effluent discharges . . ." *Id.* . . .
>
> Neither the United States Court of Appeals for the Eighth Circuit nor apparently any District Court in the Eighth Circuit has been called upon to decide a question similar to that presented here. This Court finds the rule developed by the Fourth Circuit [in *Simkins Indus.*] to be the proper rule and holds that plaintiff does have standing to pursue its claims against the City for the alleged ongoing violations of

> the terms and conditions of the NPDES permits. As explained in *Simkins Indus.*, because the definition of an "effluent standard or limitation" under 33 U.S.C. § 1365(f)(6) includes ***"a permit or condition thereof*** issued under § 1342," a violation of permit conditions is a violation of the effluent standard or limitation. 847 F.2d at 1117. ... Moreover, "[u]nless a permit holder monitors as required by the permit, it will be impossible for state and federal officials charged with enforcement of the Clean Water Act to know whether or not the permit holder is discharging effluents in excess of the permit's maximum levels." *Id.*

Quoting from *Patterson Farm, Inc. v. City of Britton, S.D.*, 22 F.Supp.2d 1085 1093 (D.S.D. 1998).

Furthermore, the Fourth Circuit's approach to Clean Water Act citizen suit standing qualifications — in contrast to the "bright line rule" of the Fifth Circuit's *Crown Central* holding — can be seen in *Friends of the Earth v. Gaston Copper Recycling*, 204 F.3d 149 (4th Cir. 2000), *en banc reversing* 179 F.3d 107 (4th Cir. 1999):

> Standing inquiry in environmental cases, for example, must reflect the context in which the suit is brought. In some instances, environmental injury can be demarcated as a traditional trespass on property or tortious injury to a person. In other cases, the damage is to an individual's aesthetic or recreational interests. The Supreme Court has made it clear that such interests may be vindicated in the federal courts. *see, e.g., Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, ... 120 S.Ct. 693, 705 ...

Quoting 204 F.3d at 154. Thus, economic and non-economic injuries may be asserted by Clean Water Act citizen suit plaintiffs, if they are "among the injured" — so that the suitor is a truly

interested stakeholder in the litigation's eventual outcome. Id. If so, Clean Water Act's citizen suit gates should be opened:

> In addition to meeting the "irreducible" constitutional minimum, *Lujan v. Defenders of Wildlife*, ... an individual must also satisfy any statutory requirements for standing before bringing suit. As noted earlier, the citizen suit provision of the Clean Water Act confers standing on any "person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). The language chosen by Congress confers standing on a "broad category or potential plaintiffs" who "can claim some sort of injury," be it actual or threatened, economic or noneconomic. *National Sea Clammers*, 453 U.S. at 16-17, 101 S.Ct. 2615. The Supreme Court recognized in *National Sea Clammers* that this [statutory] grant of standing reaches the outer limits of Article III. *Id.* at 16, 101 S.Ct. 2615 ("It is clear from the Senate Conference Report that this phrase was intended by Congress to allow suits by all persons possessing standing under this Court's decision in *Sierra Club v. Morton*.") Thus, if a Clean Water Act plaintiff meets the constitutional requirements for standing, then he *ipso facto* satisfies the statutory threshold as well.

Quoting *Gaston Copper Recycling*, 204 F.3d at 155.

Besides a "split" in the federal circuits, this Article III question involves a deviation from the U.S. Supreme Court's most recent precedent, by a circuit court of appeals, on Article III standing, an important federal question. (*See Supreme Court Rule 10(c), on conflicts by circuit courts of appeals with federal law "settled" by this Court.*) The Fifth Circuit continues, despite *Laidlaw*, to deny Article III standing recognition to Clean Water Act citizen suitors who do not fit its rigid and exclusive three-part formula set forth in *Friends of the Earth v. Crown Central Petroleum Corp.*, 95 F.3d 358, 360-361 (5th Cir. 1996) (*"Crown Central"*), — a test which this Court has very recently "settled" by indicating

that the quintessential Article III inquiry, in a Clean Water Act citizen suit, is a continuing "injury to the plaintiff," as opposed to a continuing "injury to the environment":

> The relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff.

Laidlaw, 120 S.Ct. at 704.

On example of a *Laidlaw* plaintiff, who claimed an injury-in-fact due to NPDES violations, was Gail Lee:

> Gail Lee attested that her home, which was near Laidlaw's facility, had a lower value than similar homes located further from the facility, and that she believed the pollutant discharges accounted for some of the discrepancy.

Id. at 705.

In effect, the trial court below used a 1996 Fifth Circuit case for an Article III "standing" application that now conflicts with this Court's holding in *Laidlaw*, yet the Fifth Circuit panel below, — despite specific citation to this conflict ***(see Janiks' Petition for Panel Rehearing, pages 2-6)***, — did not vacate its discussion-less reliance on that ruling, such that the Fifth Circuit panel below continued its conflict with this Court's *Laidlaw* ruling.

Why? In the proceedings below, the trial court grounded (and limited) its disposal of the Clean Water Act claim on its own application of the *Friends of the Earth v. Crown Cent. Petrol. Corp.*, 95 F.3d 358 (5th 1996), by saying:

> To establish constitutional standing, plaintiffs must show (1) actual or threatened injury, (2) fairly traceable to the City's actions, and (3) that the injury will likely be redressed if they prevail in the lawsuit. ***Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.***, 95 F.3d 358, 360 (5th Cir. 1996) ...

> The court need only address the second element because the plaintiffs have failed to meet the requirement that the injury be "fully traceable" to any City violation. To establish that their injury is "fairly traceable" to the City's discharge, *plaintiffs must establish that the* City "has (1) discharged some pollutant in concentrations greater that allowed by its permit (2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that (3) the pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs." ***Friends of the Earth*** *[v. Crown Central]*, 95 F.3d at 360-61. ... Plaintiffs have failed to adduce any evidence that they have an interest in the Trinity River, which is the relevant waterway in this case. Nowhere in their motion or response do plaintiffs identify their specific interest in the Trinity River. Plaintiffs have therefore failed to raise a genuine issue of material fact on this issue and to prove this element. The court holds that plaintiffs lack standing to assert a discharge violation under the Clean Water Act.

Order of 4-16-1998 (**Doc #342**), pages 2-3 and 4-5. The Fifth Circuit panel below effectively adopted *Crown Central's* "river interest" condition/position without any appellate opinion discussion, thus effectively applying the "river interest" test to the Janiks. *But discussion is needed!* The "stakeholder" approach to nuisance "standing" analysis has just been ratified once again, by this Court in *Laidlaw* 120 S.Ct. at 707-708 (7-to-2 holding in a Clean Water Act/NPDES permit-related case decided on Article III "standing" question).

Thus, a "river interest" condition is not *per se* required by Article III's "standing" doctrine, because *it is the injury to the plaintiffs, and* ***not*** *to the river, that is critical:*

> The relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff. To insist upon the former rather than the latter as

> part of the standing inquiry (as the dissent in essence does, *post*, at 713-714) is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with an NPDES permit. Focusing properly on injury to the plaintiff, the District Court found that *[the NPDES permit violations-alleging plaintiffs]* had demonstrated sufficient injury to establish standing. ...

Laidlaw, 120 S.Ct. at 704. Thus, the authoritative standard for screening "standing" in a Clean Water Act-based/NPDES permit violations case is whether the plaintiffs were injured by NPDES permit violations (and *not* whether proof of plaintiffs' injuries must be yoked to proof of an "environmental injury" to a particular river wherein they have a special "interest"). *Laidlaw*, 120 S.Ct. at 705 (illustrating how plaintiff Gail Lee's pollutant discharge-affected economic interests can satisfy Article III standing in a Clean Water Act/NPDES permit violation context).

The Janiks did submit competent summary judgment evidence, as a nonmovant, showing that each of the three *Laidlaw* standing elements would be provable at trial, i.e., that:

(1) the Janiks suffered an "injury in fact" that was/is (a) concrete and particularized and (b) actual or imminent;

(2) the Janiks' injuries were/are "fairly traceable" to the challenged conduct of the defendant; and

(3) it is likely, as opposed to merely speculative, that the injury will be "redressed" by a favorable decision.[2]

First, the Janiks showed they could present evidence at trial that they suffered "injuries in fact." **Doc #85** (esp. pp. 3-7, 40, describing sicknesses and property damage due to city sewage flooding contaminations); **Doc #140**(esp. pp. 1-5); **Doc #140**

[2] See *Laidlaw Env'l*, 120 S.Ct. at 704, *following Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130 (1992).

(pp. 1-5, providing medical data and diagnoses of Janik sickness as caused by untreated sewage flooding and sewage-produced bioaerosol exposures); **RECORD EXCERPTS Tab M** (pages 6, 40) **and Tab N** (page 3); **98-10781 Opening Brief** (pp. 3-4).

Second, the Janiks showed they could present evidence at trial that their injuries were "fairly traceable" to the City's strict liability violations of its EPA-issued NPDES permit, e.g., allowing an "overflow not specifically authorized" in the City's NPDES permit (violating **Part II's page 17, § E**); failing to "take all reasonable steps to minimize or prevent any discharge in violation" of its NPDES permit that "has a reasonable likelihood of adversely affecting human health or the environment" (violating **Part III's § B's ¶2**). See **Doc #331** (pp. 1-5, sewer system not fixed yet); **Doc #188** (pp. 27-35); **Doc #122**(p. 3, ¶12); **Doc #140** (pp. 1-5, providing medical diagnoses of Janik sickness as **caused** by sewage flooding and related sewage-bioaerosol exposures); **Doc #318** (pp. 1-14, esp. p. 10, providing medical diagnoses of Janik illnesses as being **caused** by sewage flooding and sewage-bioaerosol exposures); **Record Excerpts Tab M** (pp. 12-13) **and Tab O** (pp. 7-8); **Opening Brief** (pp. 8-20).

Third, the Janiks showed they could present evidence at trial that the relief sought satisfies "redressability," because § 1365(d) relief may include injunctive relief, appointment of a master, and deterrence catalyzed by civil penalties.[3] **Doc #188** (pp. 30, 86); **Record Excerpts Tab P** (showing how the plaintiffs' proof of NPDES violations can satisfy Clean Water Act "public nuisance" goals while simultaneously proving "nuisance per se" as a yoked "private nuisance" claim, as discussed in the **Opening Brief**'s pages 8-16).

The trial court denied that the Janiks were sufficiently concerned "stakeholders" qualified to bring a citizen suit challenging the city's failure to fulfill its Clean Water Act-based NPDES

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[3] *Laidlaw Env'l*, 120 S.Ct. at 706.

polluter's permit-mandated duties to *preventively* protect against, to *report*, and to *remedially mitigate* the human health-jeopardizing impacts and ongoing threats of unpermitted discharge of pollutants onto Dallasites and/or their private property.

In *Friends of the Earth, Inc. v. Crown Cent. Petrol. Corp.*, 95 F.3d 358 (5th Cir. 1996), — to the extent that any "standing" analysis in *Crown Central* survives *Laidlaw*, — an "extra" "standing" formula was used, but it only makes sense if applied to a citizen's suit primarily focusing on injury to "the environment," which is but one of the two Clean Water Act concerns, the other being "human health." But the standing question relevant to the Janiks' identity as "stakeholders" qualified to sue as citizens to enforce the Clean Water Act is whether their "special" human health-oriented injuries are "traceable" to the city's violations of its permitted right to discharge pollutants in accordance with the strict liability parameters of its EPA-issued NPDES permit. See 33 U.S.C. § 1365(g) (defining "citizen") and 33 U.S.C. § 1311(a) (defining "unlawful" noncompliance by cross-references, e.g., the NPDES section, § 1342), *in conjunction with* 33 U.S.C. § 1342 (defining the NPDES polluter's permit program) and 33 U.S.C. § 1365(f) (defining "effluent standard or limitation" to include NPDES permit and conditions thereof), and 33 U.S.C. § 1362(6) (defining "sewage" as a "pollutant"). *Accord*, **Doc #85 at 3-19.**

In the Janiks' case, the trial court erred by denying their Clean Water Act claim, based on "standing," as if only those asserting a "river interest" injury can be a stakeholder.[4] This misses the boat.

[4] As to Clean Water Act citizen suit "standing," please review the arguments, authorities, and Rule 56 evidence chart provided in *Plaintiffs' Motion to Reconsider the Partial Summary Judgment of 10-14-1997, With or Without . . . Page Number Citations* (filed 10-24-1997 as **Doc #241**), — esp. at its pages 2-3, and attached Exhibit A (pages A-1 through A-13), Exhibit B (pages 42-53, — about Clean Water Act "standing"), Exhibit D (Miller Declaration, last 3 pages),

The Janiks' suit is a modern-day equivalent of a "combined" public-and-private nuisance claim.

The Janiks suffer special injuries directly related to one of the twin concerns of the Clean Water Act and RCRA: *"human health"* and *"the environment"*). By missing this twofold key to the "public nuisance" side of the Clean Water Act's nature, the trial court has ignored and negated literally centuries of Anglo-American legal history. Historically *(for 460+ years!)*, nuisance claimant "stakeholder" status at common law has been recognized as satisfied — since the reign of King Henry VIII — by the public nuisance claimant's proof of a "special" (personalized) injury that is substantial and/or uniquely suffered, such that a "stakeholder"— claimant's injury credentials him to assert a claim to "abate" (remedy) the incurred, ongoing, and/or imminently threatened damages to the public's rights. See Prosser, Wade & Schwartz, Cases and Materials on Torts, 7th ed., "Nuisance," at 855, *citing as the seminal case*, Y.B. 27 Hen. VIII, Mich., pl. 10 (1536), and Prosser, *supra*, at 847-848, *citing* McRae, "Development of Nuisance in the Early Common Law," 1 U. Fla. L. Rev. 27 (1948), *and* Keeton, "Trespass, Nuisance and Strict Liability," 59 Colum. L. Rev. 457 (1959), and Restatement, 2nd Torts § 821C ("Public nuisance").

Because the "stakeholder" must have a "special" injury from the nuisance, it is not unusual for such a claimant to combine (or to "unite") his "private nuisance" and "public nuisance" claims into the same lawsuit. Prosser, Wade, & Schwartz, Torts (7th ed., 1982), "Nuisance," at 848. Texas case law accords with this time-honored tradition. *E.g., Ballenger v. Grand Saline*, 276 S.W.2d 847 (Tex. Civ. App. — Waco 1955); *Newton v. Highland Park*, 282 S.W.2d 266 (Tex. App. — Dallas 1955, writ ref'd, n.r.e.). In fact, the private claimant who can best assert a public

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Exhibit E (Janik Declaration, pages 1-2), Exhibit G (Levine Declaration, 3 pages), Exhibit M (McKasson Declaration, pages 1-3), Exhibit Q (Rule 56 List, pages 1-3), — with **Doc #85 at 3-19**.

nuisance-like action is the private citizen who himself or herself can simultaneously assert a private nuisance-like claim.

Since the Janiks have been Dallasites receiving City of Dallas sewer service via Dallas Water Utilities *[a stakeholder fact which Mr. Janik's Rule 56(e) declarations confirm]* — at all times during 1993 to date, — the Janiks are as much at risk of the city's unmitigated biohazardous risk-producing noncompliances, with the city's Clean Water Act/NPDES permit, as the Janiks were when those city noncompliances caused their disastrous personal injuries and personal property losses during 1993. If the Janiks have no Clean Water Act § 1365 "standing" to complain — about the city's ongoing failure to prevent untreated sewage wastewater overflows by fixing the defective sanitary sewer system, and about the city's ongoing failures to monitor and report their untreated sewage overflows, and about the city's ongoing failure to mitigate the harms causes by its "we're-unaccountable-so-we-don't-mitigate" practices, — then what Dallasites ever can?

How can the EPA adequately oversee Clean Water Act compliance if the city can evade NPDES permit compliance duties by non-reporting unlawful discharges, then assert state law "immunity" regarding citizen suits for permit violations?

1-C. The Fifth Circuit's failure to use legislative history.

In effect, the Fifth Circuit's "bright line rule" in *Crown Central* is defeating the very intent of Congress, whose intent must be judicially considered in Clean Water Act decisions. This is error. *Waste Action Project v. Dawn Mining Corp.*, 137 F.3d 1426, 1428-1429 (9th Cir. 1998), *following Train v. Colorado PIRG*, 426 U.S. 1, 9-11, 96 S.Ct. 1938, 1942-1943 (1976).

In fact, the Clean Water Act's own language, as well as its legislative history, indicate that Congress strove to protect both **"human health"** and **"the environment"**, and that this was to be accomplished in part by "public participation" in "enforce-

ment". *E.g.*, 33 U.S.C. **§ 1251(e)** ("Public participation in ... enforcement of any regulation, etc.: **Public participation in ... enforcement of any regulation, standard, effluent limitation, plan, or program established by the [EPA] Administrator ... under this chapter shall be** provided for, **encouraged**, and assisted by the [EPA] Administrator and the States ..." [*emphasis added*]); **§ 1311(g)(2)(C)** ("A modification under this subsection shall be granted only upon a showing ... [that] such modification will not result in a discharge of pollutants ... which may reasonably be anticipated to pose an unacceptable risk to **human health or the environment** ..." [*emphasis added*]); **§ 1342(k)** ("National Pollutant Discharge" Elimination System" ... "Compliance with permits: Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 ..., except any standard imposed under section 1317 of this title for a toxic pollutant injurious to **human health** ...[*emphasis added*]); **§ 1365** ("Citizen suits"); etc. *See, accord,* 1972 U.S. Code Cong. & Adm. News, p. 3668, re Pub.L. 92-500, esp. 3750-3751, 3825. *Cf. also* 1977 U.S. Code Cong. & Adm. News, p. 4326, re 1977 Pub.L. 95-217; 1981 U.S. Code Cong. & Adm. News, p. 2629, re Pub.L. 97-117.

Thus, the end-result of the Fifth Circuit's *Crown Central* "bright line rule" is to improperly quash opportunities for private attorneys general to have the greatest-possible access to federal courts, for Clean Water Act-based health-related citizen suits:

> The Supreme Court recognized in *National Sea Clammers* that this [statutory] grant of standing reaches the outer limits of Article III. *Id.* at 16, 101 S.Ct. 2615 ("It is clear from the Senate Conference Report that this phrase was intended by Congress to allow suits by all persons possessing standing under this Court's decision in *Sierra Club v. Morton.*") Thus, if a Clean Water Act plaintiff meets the constitutional requirements for standing, then he *ipso facto* satisfies the statutory threshold as well.

Quoting *Gaston Copper Recycling*, 204 F.3d at 155.

Accordingly, a citizen suit is proper if the plaintiff asserts within his or her complaint a good faith claim for an "injury in fact," personal to that plaintiff, that "flows" from a defendant's violation of the Clean Water Act's NPDES permit program.

Moreover, as citizen suit affiant Gail Lee's example in *Laidlaw* illustrates, 120 S.Ct. at 705, the Article III-qualifying injury claimed by the citizen suit plaintiff need not be a "recreational" or "aesthetic" interest in a "U.S. water," it may be to a personal property interest that is directly harmed by a U.S. water's behavior triggered by a Clean Water Act violation committed by the defendant. *See also, accord, Driscoll v. Adams*, 181 F.3d 1285, 1291 (11th Cir. 1999) (landowner's stormwater runoff from construction site drained into stream that intermittently flows as a tributary into Spiva Branch, a "navigable water," injuring economic interests of neighboring property owner), *citing United States v. Eidson*, 108 F.3d 1336, 1341-1342 (11th Cir. 1997) (drainage ditches and manmade canals can qualify as "waters of the United States" for Clean Water Act violation purposes, if they flow into a "navigable water").

2. Notice Pleading, Rule 15(d), & R.C.R.A. Citizen Suits.

This Court should grant a reversal, to correct the Fifth Circuit's failure to reverse the district court's factual detail requirements-based dismissal of the Janiks' alternative claim for a **Resource Conservation & Recovery Act** ("RCRA") citizen suit, — notwithstanding this Court's "notice pleading" doctrine settled in *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 103 (1957), — and notwithstanding a pending **Rule 15(d)** motion to more definitely state the RCRA citizen suit's critical facts (re disposed chemicals defined by the E.P.A. in **40 CFR Pt. 122** as "hazardous substances"; see Janik Appendix Part "C"). In essence, the Fifth Circuit affirmed a judgment on the pleadings, and thereby dismissed the alternative RCRA-based claim as if a RCRA-based

claim had not even been pled at all. However, the plaintiffs provided adequate "notice pleading" of their alternative RCRA citizen suit claim, — satisfying the "notice pleading" doctrine of *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 103 (1957). Accordingly, the Fifth Circuit's affirmance below conflicts with "settled" U.S. Supreme Court precedent. (*See Supreme Court Rule 10(c), regarding conflicts by circuit courts of appeals with federal law "settled" by this Court.*)

Moreover, the Janiks offered to make a more definite statement of their RCRA-based citizen suit claim via Rule 15(d), moving for leave to file a Supplement to their amended complaint. The district court below rejected this practical solution to the RCRA "notice pleading" issue, in direct conflict with this Court's holding in *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962).

Furthermore, the Fifth Circuit's affirmance of the trial court below, on this Rule 15(d)-related issue, contradicts precedents in other federal circuits. *E.g., see Quarantino v. Tiffany & Co.*, 71 F.3d 58, 65-66 (2nd Cir. 1995) ("leave to file a supplemental pleading should be freely permitted when the supplemental facts connect it to the original pleading"); *LaSalvia v. United Dairymen*, 804 F.2d 1113, 1119 (9th Cir. 1986), *cert. denied*, 482 U.S. 928, 107 S.Ct. 3212 (1987) (Rule 15 supplements to pleadings should be freely permitted when supplemental facts connect the supplemental pleading to the original pleading's focal fact allegations). Thus, the Fifth Circuit's treatment of Rule 15(d) in the Janik case clashes with Rule 15(d)'s treatment by the Second and the Ninth Circuits. (*See Supreme Court Rule 10(a), regarding "conflicts" in the federal circuits.*)

In effect, the Janiks' Rule 15(d) motion would have been granted in the Second Circuit and in the Ninth Circuit, and thus the Janiks would have, there, been allowed a "day in court" to prove up their alternative RCRA-based claim facts, *e.g.*, the RCRA-relevant facts provided in the Rule 56(e) declarations of expert witnesses Brandon, McElyea, and Egbert). This is a

particularly clear-cut case of the defendant having no "unfair prejudice" by the Rule 15(d) filing, because the plaintiffs' critical fact-pleading therein represented RCRA-relevant data that was repeatedly and wrongfully withheld (i.e., not produced) by the city during the discovery phase, as **Doc #348** demonstrates. *See, accord, Patterson Farm, Inc. v. City of Britton, S.D.*, 22 F. Supp.2d 1085, 1093 (D.S.D. 1998) ("However, because the City has not provided plaintiff in this case with all of the relevant records, the City's motion for summary judgment cannot prevail. Nor has the City offered sufficient evidence to refute the allegation that it has violated its NPDES permits by failing to abide by inspection and record keeping provisions . . .").

2-A. Notice Pleading Requirements for R.C.R.A. Citizen Suit.

In more particularized summary, the first half of this second federal question is whether the Third Amended Complaint satisfied federal "notice pleading" standards for **Resource Conservation & Recovery Act** citizen suit relief available under 42 U.S.C. § 6972, — pursuant to the "notice pleading" doctrine of *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 103 (1957):

> **The . . . Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claims. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.** The illustrative forms appended to the Rules plainly demonstrate this. **Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial proceedings established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.** . . . The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive

> to the outcome and [we] accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Conley, 355 U.S. at 47-38, 78 S.Ct. at 103 (emphasis added).

The Janiks' Third Amended Complaint [**Doc #188, at pp. 75-80**] pled *in the alternative* for "other appropriate relief available under 42 U.S.C. § 6972," in conjunction with complaint allegations suggesting that city discharges of *untreated* sewage constituted RCRA violations (and thus did not qualify for 42 U.S.C. § 6903(27)'s exemption regarding *treated* domestic sewage), being disposals of hazardous substances that posed (and still pose) a substantial present or potential hazard to human health or the environment when improperly managed and/or improperly disposed of, due to the defective conditions of the city's sanitary sewer line's pre-treatment conveyance piping.

Though the Janiks still allege (as per page 81 of **Doc #188**) that this case is more of a Clean Water Act/nuisance case than a "RCRA-rooted action *per se*", the plaintiffs still reserve the right (as suggested in ¶77b of said **Doc #188**'s page 81) to assert the RCRA citizen as the leading federal claim *if* plaintiffs are disallowed to sue under the Clean Water Act.

The 3rd Amended Complaint itself explicitly requested "appropriate relief, including but not limited to: ... appropriate relief available via 42 U.S.C. § 6972" — which statutory section this Court can judicially notice is RCRA's citizen's suit provision.

Moreover, the general "pleading picture" described by the Janiks' pleadings qualifies the Janiks' case within RCRA case law standards regarding the RCRA citizen suit provision's critical terms: "imminent," "substantial," and "endangerment". **"Imminent"**, for RCRA citizen suit purposes, refers to the nature of the threat, rather than identifying the expected time when of the threat's emergency occurrence. *Dague v. City of Burlington*, 935 F.2d Cir. 1343, 1355-1356 (2d Cir. 1991). *See* **Doc #318**

at 11-18, esp. at 18; Doc #332 at 3 (¶5b, ¶6); **Doc #331 at 3** (¶5b, ¶6). **"Endangerment"**, for RCRA citizen suit purposes, means "a threatened or potential harm and does not require proof of actual harm." *Quoting Dague*, 935 F.2d at 1356. *See* **Doc #318 at 11-18, esp. at 18; Doc #332 at 3** (¶5b, ¶6); **Doc #331 at 3** (¶5b, ¶6). As to **"substantial"** endangerment, *see* **Doc #318 at 11-14, 18.** Plaintiffs' Rule 15 motion was never explicitly ruled on prior to the expiration of the trial court's jurisdiction over the City of Dallas side of this litigation. Accordingly, this Court should rule that RCRA's requirements for pleading a citizen suit were satisfied by the Janiks' "notice pleading" in **Doc #188, esp. at pages 75-82, ¶¶ 75-80**). (*Accord, see* **Doc #318 at 11-18; Doc #140**). The Janiks, as RCRA citizen suit plaintiffs, should be granted their "day in court".

2-B. Abuse in Rejecting Rule 15 Supplement to Complaint.

Even if plaintiffs were incorrect in their argument 2-A above, plaintiffs should nevertheless be permitted to try their RCRA-based claim as a citizen suit clarified by their attempted "more definite statement" in their Supplement, pursuant to Rule 15(d). In more particularized form, the second half of this second federal question is whether a district court can refuse, without abusing its **Fed.R.Civ.P. Rule 15** discretion, to accept filing of a Rule 15 supplement to an amended complaint, in order to permit a plaintiff's more definite statement regarding a **RCRA** citizen suit pleading under 42 U.S.C. § 6972.

This result is especially proper in this case, since the Janiks' submitted Rule 15 supplemental pleading described and summarized E.P.A.-mandated monitoring data involving 21 disposed chemicals (all 21 being defined by the E.P.A. in **40 CFR Pt. 122** as "hazardous substances"), of direct relevance to the originally pled complaint facts, and did so within a discovery-framed context that clarified that there could be no Rule 15-related showing of unfair prejudice to the defendant.

In this case, the reason for the plaintiffs' delay in pleading the names of the 21 "hazardous substances" (improperly "disposed" by the city) was that the city did not properly produce the monitoring data in discovery, despite defendant's knowledge that the citizen suit focused on defendant's discharges of pollutants into a tributary network of a navigable river. See **Doc #348**.

As noted above, the Second Circuit utilized the *Quarantino* case to define a trial court's Rule 15(d) discretion. In the *Quarantino* case the plaintiff added a new claim for relief; in the Janiks' case, however, only a "more definite statement" of the "alternative" RCRA citizen suit allegations was sought. (Compare **Doc #188**, at complaint pages 75-82, with **Doc #348**, at pages 1-16, plus its attached proposed "Supplement" at pages 1-6.) Despite *Quarantino* being cited to the trial court (**Doc #347**, page 4), it denied the Janiks' Rule 15 motion by implication (in **Doc #352**) and by a later ruling (**Doc #360**) that issued after appeal was noticed (**Doc #358**). Accordingly, the Fifth Circuit's affirmance below represents a "split" in the circuit courts of appeals regarding a trial court's discretion to accept or reject the filing of a Rule 15 supplement.

Accordingly, denial of the Janiks' Rule 15(d) motion — which attempted to add hazardous substance disposal allegations not know earlier due to improper discovery obstruction by the city — was an abuse of discretion that prejudicially rewarded the city's improper discovery tactics. *See, accord, Patterson Farm, Inc. v. City of Britton, S.D.*, 22 F.Supp.2d 1085, 1093 (D.S.D. 1998).

3. Rule 56(e) Requirements for Nonmovants.

This Court should grant a reversal of the Fifth Circuit's affirmance below, to correct the ruling that a nonmovant's **Rule 56(e)** evidence, including expert and fact witness declarations, may be deemed "undesignated" (and thus be ignored without meaningful Rule 56 evaluation) by a district court, when the nonmovant's Rule 56(e) initial objection omitted pagination

cites to such Rule 56(e) declarations, — notwithstanding this Court's substance-over-form norm settled in *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553 (1986). A reversal of such a ruling is especially appropriate in this case, since the nonmovants immediately "cured" the supposed problem by promptly filing a nonmovant's motion for reconsideration that provided pagination-cites and proof indexing.

In more particularized form, this third federal question is whether a district court may repeatedly decline to meaningfully evaluate the provable merits of a nonmovant's **Rule 56(e)** evidence, — notwithstanding this Court's substance-over-form norm within *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553 (1986), — by deeming nonmovant's Rule 56(e) evidence as "undesignated" because nonmovant's first Rule 56 response did not expressly cross-reference Rule 56(e) declarations' page numbers, despite the Rule 56(e) record being promptly "cured" 9 days later.

Specifically, the 10-15-1997-entered interlocutory ruling that faulted the Janiks for having "undesignated" evidence [**Doc #238**] was later vacated as of 4-16-1998 [**Doc #342**], followed by a similar interlocutory ruling that continued to suggest that the Janiks' Rule 56(e) evidence was still "undesignated," although is was no longer (as of 10-24-1997, when **Doc #241** cured and/or mooted any possible "undesignated" Rule 56(e) evidence problem). This usage of a interlocutory partial summary judgment, post-vacatur, so that a substitute ruling later recited an "undesignated" record, when no such "undesignated" record then existed, was a reversible error that was later incorporated by reference into the final judgment [**Doc #352**].

The trial court's rejection of the Janiks' Rule 56(e) proof, including the expert witness and fact witness declarations, was a punitive sanction that exceeded Due Process boundaries. Because the trial court's deemed "undesignated" sanction is not authorized

by the text of Fed.R.Civ.P. Rule 56(e), and because it conflicts with the substance-over-form doctrine of *Celotex*, the Fifth Circuit's affirmance below represents a conflict with this Court's "settled" precedent regarding Rule 56(e). (*See Supreme Court Rule 10(c), regarding conflicts by circuit courts of appeals with federal law "settled" by this Court.*) See also, accord, Brunet, "Summary Judgment Materials," 147 F.R.D. 647, 656-657 (1993).

4. Governmental Immunity Versus Federal Preëmption.

This Court should grant a reversal, to correct the Fifth Circuit's approval of **Rule 56** rulings, in a **Clean Water Act/R.C.R.A.** citizen suit context, that deny the application of **Article VI's Supremacy Clause** to preëmptively limit state sovereignty and state statute-grounded "governmental immunity" claimed by a city, as a defense to that city's accountability for its acts or omissions that violate federal environmental statutes. Otherwise, this Court's federalism doctrine and preëmption ruling settled in *Sanitary District of Chicago v. U.S.*, 266 U.S. 405, 425-426, 45 S.Ct. 176, 178 (1924), will go ignored and unenforced.

In more particularized form, this fourth federal question is whether a district court's **Rule 56** rulings in a **Clean Water Act** citizen suit may avoid recognizing that **Article VI's Supremacy Clause** preëmpts a state "governmental immunity" defense as to any municipality's acts or omissions that violate its **NPDES** permit, — when doing so disarms the force of this Court's holding in *Sanitary District of Chicago v. U.S.*, 266 U.S. 405, 425-426, 45 S.Ct. 176, 178 (1924).

By not reaching *(much less discussing)* the issue of federal preëmption *(regarding polluter permit duties)*, the Fifth Circuit negated the NPDES-rooted strict liability bases for the Janiks' claims under both Texas state statutory law (esp. the "TTCA") and Texas state Constitution (Texas' non-negligent "nui-

sance"/"damaging" remedy), so this Court should correct its ruling to accord with federal preëmption law.

Thus, at the trial court level, the district court avoided the implications of both Clean Water Act and RCRA preëmption of state immunity laws to the extent that they involve pollutant "discharge" regulations affecting "navigable water" pollution as well as the "disposal" of "hazardous wastes." This side-stepping of federal environmental regulatory schemes effectively ignored and deviated from *Sanitary District of Chicago v. U.S.*, 266 U.S. 405, 45 S.Ct. 176, 178-179 (1924), a "settled" preëmption precedent regarding navigable waters-related sewage regulation. *(See Supreme Court Rule 10(c), regarding conflicts by circuit courts of appeals with federal law "settled" by this Court.)*

The city's plea of unaccountability, as to its duty to comply with its NPDES permit, is directly contradicted by the city's own sewage treatment plant operational records, which include the following entry that *admits a permit violation:*

> **10/31/93 Sunday D shift**
>
> ...*Surge basin* ***pumps failed,*** *not tripped,* ***causing run-off overload into stormwater system — violation of permit (bypass).*** Sandy hurt hand/wrist on bypass valve at sludge transfer pumps, but **did not want to fill out an accident report.** ... PP system still not feeding out well.

Quoting **Doc #316 at 8 (emphases added).**

In any event, the city cannot legally assert "discretionary powers" to evade the very specific standards, terms, and conditions of its EPA-issued NPDES polluter's permit, such as the specific affirmative and prohibitive standards noted (and quoted) within **Doc #188**, *e.g.*, at page 27's ¶20d(a) (quoting NPDES permit @ page 17 of Part II, § E:

> ...overflows from any part of the publicly owned treatment works collection system are not authorized by

> this permit. Any such overflow not specifically authorized in an NPDES permit would constitute an unpermitted discharge. . . .

and further noting, at page 27's ¶20d(b), that the City of Dallas' NPDES permit @ Part III, § B, ¶2, indicated the city's duty:

> **. . . [to] take all reasonable steps to minimize or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment"). . . .** [emphasis added]

The trial court turned federalism on its head by allowing the City to escape federal accountability from a federally preemptive regulatory scheme (and its mandated strict liability standards), by the city's assertion of a *hierarchically inferior* state-law affirmative defense called "discretionary powers" (TTCA, §101.506). For a state law to be permitted to violate a federal law, Congress must manifest "unambiguous intent" to excuse such violations, *Wyoming v. Oklahoma*, 502 U.S. 437, 112 S.Ct. 789 (1992). No such Congressional intent exists in this case.

Does the City of Dallas regard itself as above federal law? — as above NPDES permit accountability? **Yes, they have even said so:**

> ... the Clean Water Act is not applicable or relevant to this case. Defendant [*City of Dallas*] admit[s] that Plaintiffs have filed this action to seek injunctive relief against the City of Dallas, as stated in . . . Plaintiffs' Third Amended Complaint, but **Defendant [*City of Dallas*] denies Plaintiffs are entitled to such relief, and further denies it is required to report any discharges of untreated sewage onto Plaintiffs' premises pursuant to its NPDES permit. Defendant [*City of Dallas*] admits that it did not report any alleged discharge of sewage into the sanitary storm sewer [*sic*] near Plaintiffs' premises.**

Quoting City of Dallas' First Amended Original Answer [**Doc #190**], page 15 (emphasis added).

Yet, under Supremacy law, the city may not constitutionally justify its claim that its nuisance law-based immunity and state statute-defined "discretion" escapes federal NPDES permit violation consequences. *Accord, U.S. v. Gulf Park Water Co., Inc.*, 972 F. Supp. 1056, 1059 (S.D. Miss. 1997) (discharge from sewage treatment plant was "pollutant"; compliance with Clean Water Act is strict liability matter); *Ward v. Coleman*, 423 F. Supp. 1352, 1357 (D.C. Okla. 1976) (federally mandated "performance rather than excuses" is what the Clean Water Act imposes on polluters); *U.S. v. Allegheny Metal Finishing Co.*, 696 F. Supp. 275, 281, 283, 285-286 (W.D. Mich. 1988) (NPDES permit-holder held strictly liable for violating "technology-forcing" RCRA standards, due to the permit-holder's unapproved waste storage/disposals). The very least that the city should have done, due to its NPDES duty to "mitigate" adverse health impacts, would be to have promptly **warned** the Janiks about the biohazardous situation, especially as to contaminating, airborne colony-forming bio-aerosols and sewage-borne toxin-containing hazardous wastes:

> The City of Dallas man *did not offer to help clean* nor *did he give us any warnings* as to the seriousness of such raw sewage exposure. He *did not warn* us that breathing the air above such an overflow was very dangerous to our health.

Quoting **Doc #122 at 3, ¶12** (Mrs. Janik's declaration; emphasis in original). A failure to warn in such a situation, as a matter of law, must be a violation of the NPDES permit "duty to mitigate".

CONCLUSION

The City of Dallas is a city government that: (1) *had and has a* ***duty*** *to obey* ***federal pollution laws and standards;*** (2) ***breached*** *many of those duties, and yet continues to do so;*

(3) *thereby* ***caused illnesses and property losses*** *to four Dallas residents, who are now serviced by Dallas Water Utilities and are (as others) still at risk.* Also, Texas state nuisance law must be interpreted in a manner that does *not* thwart federal preëmption law (which **imposes NPDES and RCRA duties on the City of Dallas,** with its **strict liability** violation accountabilities), despite City claims of "discretion" immunity.

The Janiks are a family who have resided in and who continue to reside in the City of Dallas, and their sanitary sewer utilities are supplied by and serviced by the City of Dallas.

To the extent that the City of Dallas continues to violate its EPA-issued NPDES permit's terms and conditions:

(a) such as the mandatory obligation of the city to take actions **to prevent** the unpermitted discharges of untreated sewage from the city's sanitary sewer system,

(b) such as the city's mandatory obligation **to properly monitor and to report** to the EPA its sanitary sewer system's discharges, and

(c) such as the city's mandatory obligation **to mitigate harms to human health and the environment** caused by unpermitted discharges from the city's sanitary sewer system, —

the Janiks (like other Dallasites serviced by Dallas Water Utilities) stand at risk of a re-run of their untreated sewage-discharge-caused physical health injuries and personal property losses. The Janiks, as much or more than any other family of Dallas residents, are proper "citizen suit" plaintiffs who have suffered injury from NPDES violations, and who continue to be threatened with imminent re-injury from similar non-mitigation episodes caused by the continuing non-compliance of and institutionalized policy of unaccountability of the City of Dallas, with respect to its NPDES permit. The institutionalized policy and

practice of the city is such that the cause of the city's NPDES permit non-compliance problem is still "unfixed". The City of Dallas' defective sanitary sewer system is one of the oldest and largest in the nation — it is an inadequately managed time-bomb waiting to explode with harms again, to revisit someone with the Janiks' nightmare, or with the Shades' nightmare,[5] despite the fact that accountability respecting and compliance with the city's NPDES permit would provide preventive protection against this continuing non-compliance and imminent threat of harm to human health and/or to the environment, including but not limited to imminent harm to the artificial tributary network of the natural tributary basin of the Trinity River, which is a navigable river of the United States, preëmptively regulated by the Clean Water Act.

Moreover (or alternatively), the Janiks have standing to seek and have properly pled for citizen suit remedies under RCRA, due to the city's unauthorized disposal of EPA-defined hazardous substances on or about October 31, 1993 (**Doc #318**, pp. 13-18 cross-referenced to 40 CFR Pt. 122, App.D, Table V), — despite non-production of the city's monitoring reports regarding such hazardous substances, which discovery non-compliance delayed the Janiks' ability to amend their pleadings with a more definite statement of their RCRA claim. Under Article III as it is interpreted in *Laidlaw*, and as it is interpreted outside of the Fifth Circuit, the Janiks are "stakeholders" with constitutional "standing" to sue as citizen suit plaintiffs under the Clean Water Act who assert their own injuries caused by the city's NPDES permit violations. Also (or alternatively), the Janiks seek RCRA-based citizen suit remedies. **In particular, the Janiks seek proper civil penalties, injunctive relief, remedial appointment of a master (if necessary), declaratory relief, costs and attorneys fees, and other proper relief from the challenged rulings below, —**

[5] See *Shade v. City of Dallas*, 819 S.W.2d 578 (Tex. App. — Dallas 1991, no writ) (untreated sewage wastewater case).

pursuant to this honorable Court's granting of a Writ of Certiorari to the Fifth Circuit Court of Appeals, followed by a reversal of the rulings below (that relate to the City of Dallas), and otherwise providing proper relief for petitioners.

Respectfully submitted,

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